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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ANNETTE and CHARLES OLLIVIER,
Petitioners,

v.

ARTHUR GLITZ, OFFICER BARANOWSKI,
DENNIS BECKEL, and the
VILLAGE OF MUNDELEIN,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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April 28, 1981

QUESTIONS PRESENTED

1. Whether the abstention doctrine should be extended to notices of civil administrative proceedings.

2. Whether a substantial state interest must exist before the abstention doctrine can be applied to state civil proceedings.

3. Whether misapprehension of state procedure by the court below worked a fundamental unfairness by the misapplication of the abstention doctrine.

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The petitioners, Annette and Charles Ollivier respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 2, 1981.

OPINION BELOW

The relevant portions of the opinion of the Court of Appeals and of the District Court appear in the Appendix.

JURISDICTION

The judgement of the Court of Appeals was entered on February 2, 1981. No rehearing was requested. This petition for certiorari was filed within 90 days of that date; this Court's jurisdiction is invoked under 28 USC section 1254 (1).

QUESTIONS PRESENTED

1. Whether the abstention doctrine should be extended to notices of civil administrative proceedings.

2. Whether a substantial state interest must exist before the abstention doctrine can be applied to state civil proceedings.

3. Whether misapprehension of state procedure by the court below worked a fundamental unfairness by the misapplication of the abstention doctrine.

NO STATUTORY PROVISIONS ARE INVOLVED

STATEMENT OF THE CASE

On July 3, October 3, and October 5, 1979, petitioners were issued "notices of ordinance violation" charging them with failure to display a valid vehicle sticker. On July 17, 1979, without plea of guilt, petitioner Charles Ollivier paid the fine for the July 3 notice (App. Dec., pa. 1,2).

On October 16, 1979, petitioners filed the action in the district court. Jurisdiction was invoked under 42 USC section 1983 and 28 USC section 1343, alleging, inter alia, illegal search of private property (App. Dec., pa. 2).

On October 29, 1979, the District Court, accepting the respondents' assertion that state court action was commenced with the issuance of the notice, invoked the abstention doctrine and dismissed the complaint (USDC Dec., pa. 3). On December 18, 1979, it denied petitioners' motion for reconsideration. On January 10, 1980 the Notice of Appeal was filed.

On January 26, 1980, petitioners were again issued notices for not displaying valid vehicle stickers (Reply brief, pa 3).

On February 5, 1980, trial was held in traffic court for the notices issued in October 1979. Annette Ollivier was found guilty; Charles Ollivier was found not guilty as his automobile was not registered to a Mundelein address as required by ordinance (Reply brief, pa. 2, 3).

On March 21, 1980 in their brief to the court below (pa. 10) the respondents again asserted that state court action had begun

with the issuance of the notice.

On March 25, 1980, the state court refused to hear a motion by Charles Ollivier for summary judgement regarding the notice issued January 26, 1980. It found that though the notice of violation had been issued, because no complaint and summons had been issued the matter was not properly before the court(Reply brief, pa. 3).

On July 29, 1980, the respondent Village of Mundelein asserted in its brief to the state appellate court that the issuance of the notice "is not a first process in a court action, but is instead, a method of notice and debt collection" (see: App. Dec., pa. 3).

On February 2, 1981, the Court of Appeals found that state court proceedings were not begun with the issuance of the notice. However, it held that though the issuance of the notice is insufficient to formally initiate judicial proceedings, it is sufficient to place the matter within the state forum because the issuance "leads inexorably to a state court proceeding providing the alleged violator with a concrete opportunity to vindicate his constitutional rights (citation)"(App.

Dec., pa. 4). It affirmed the District Court's invoking the abstention doctrine as to the October, 1979 notices; it reversed the District Court's invoking the abstention doctrine as to the July, 1979 notice.

REASONS FOR GRANTING THE WRIT

The reasons are threefold:

1. The extension of the abstention doctrine to administrative procedures is unwarranted and in conflict with the decisions of the courts of other circuits and districts.

2. The court below applied the wrong test in determining the mandatory need for abstention.

3. Abstention in these circumstances would work a fundamental unfairness.

---

1. The abstention doctrine should not be expanded to include state civil administrative proceedings.

The petitioners are only two individuals; however, because the great majority of citizens face the courts only in causes in the nature of ordinance violations, the

compass of the decision here is national in its breadth. The effect of the decision below is to bar the federal courts to citizens whenever municipal ordinance violations are involved or alleged.

The Court of Appeals found that the issuance of the notice of ordinance violation is an administrative procedure to simplify the collection of fines, therefore, there were no state judicial proceedings at the time the federal action was initiated (App. Dec., pa. 3).

However, the court invoked the abstention doctrine because the notice of the administrative action "leads inexorably to a state court proceeding" (emphasis supplied) allowing the citizen a concrete opportunity to vindicate his constitutional rights (App. Dec., pa. 4).

The petitioners know of no case where this Court has applied the abstention doctrine to an administrative notice procedure (Walker v. Wegner, 477 FS 648, 654, (D.SD, 1979), aff'd 624 F2d 60 (8th Cir., 1980); see: General Motors Corp. v. Buha, 623 F2d 455, 459 (6th Cir., 1980)).

The District Court below ruled that the abstention doctrine applied only because

of the assertion by the respondents that by the issuance of the notice "there are state court proceedings" (Appellee's Brief pa. 10).

The extension of the abstention doctrine to the issuance of an administrative notice by a police officer is an application which has been carried beyond the bounds necessary to protect important state interests. Here there is no important state interest to justify such an expansive application - the federal action involves no issues of state law; it raises only federal constitutional issues. Federal jurisdiction should not hinge on the pen of a police officer issuing an administrative notice.

2. Assuming, arguendo, that the administrative notice procedure rises to the level of a state civil judicial proceeding the Court of Appeals' sole reliance on the "pertinent inquiry" test (App. Dec., pa 5) to trigger the abstention doctrine was error.

Younger v. Harris, 401 US 37, 91 SCt 746, 27 LEd2d 669(1971),extended the abstention doctrine to all state criminal proceedings absent certain unusual circumstances (Wil-

liams v. O'Neill, 500 FS 913, 916 (D.Conn, 1980)).

Moore v. Sims, 442 US 415, 99 SCt 2371, 60 LEd 2d 994 (1979), extended the abstention doctrine to "civil proceedings in which important state interests are involved" (emphasis supplied) (at 2377).

The court below used the "pertinent inquiry" test articulated in Moore, at 2378, as the sole basis to determine whether the abstention doctrine was proper (App. Dec., pa. 5).

The use of the "pertinent inquiry" test alone misapprehends the circumstance for abstention. The doctrine exists to protect important state interests. "The doctrine of abstention...is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstance where (the return to state court) would clearly serve an important countervailing interest" (emphasis supplied) (Colo. River Water Conversation Dist. v. U.S., 424 US 800, 96 SCt 1236, 1244, 47 LEd 2d 483 (1976); City Investing Co. v.

SIMCOX, 633 F2d 56, 60 (7th Cir, 1980)).

Moore is not a broadstroke command to federal courts to invoke the abstention doctrine in all cases where there is pending state civil action. "...we do not remotely suggest 'that every pending procedure between a state and a federal plaintiff justifies abstention unless one of the exceptions of Younger applies'" (Moore, supra, at 2377, fn 8). Rather, this Court limited the doctrine "... to civil proceedings in which important state interests are involved" (Moore,supra, at 2377).

The need for important state interests is enhanced in light of the discovery by municipalities that it is easier and more profitable to police law-abiding citizens than criminals.

Therefore, petitioners submit that before applying the "pertinent inquiry" test, a court must first decide whether there is a legitimate basis for invoking the abstention doctrine at all (Moore, supra, Dissent, at 2383). If there is no important state interest to be served by abstention, there is no need to apply the "pertinent inquiry" test.

Examples of important state interests in civil actions (Moore, supra, at 2377):

> "the temperary removal of a child in a child abuse context is... 'in aid of and closely related to criminal statutes.'"
>
> "...such other vital concerns as enforcement of contempt proceedings."
>
> "...or the vindication of 'important state policies such as safeguarding the fiscal integrity of (public assistance) programs.'"

The court should also look to the rights of the aggrieved citizen in determining the state interest.

The relationship between a local government and a citizen is a matter of local concern and local law so long as that relationship is conducted within certain Constitutional parameters. However, once a citizen properly complains to the Federal government, by its courts, that a right guaranteed him by the United States Constitution has been violated by the local government, the matter assumes Federal proportions.

These interests attain Federal proportions by virtue of the fact that they have been recognized and protected by the Congress in its enacting 42 USC 1983 and 28 USC

1343, and by this Court in its ruling in Monell v. Dept. of Social Services, 98 SCt 2018 (1978), holding a local governmental entity liable under 42 USC 1983.

28 USC 1343 invests the Federal court with original jurisdiction over claims of violations of Federal constitutional rights. This is of special importance in civil rights actions under 42 USC 1983 "since Congress, in adopting that statute and its jurisdictional counterpart, 28 USC 1343, 'imposed a duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.'" (McRedmond v. Wilson, 533 F2d 757, 760 (2d Cir, 1976), quoting Zwickler v. Koota, 389 US 241, 248 (1967)).

Petitioners submit that the initiation of an administrative notice procedure does not rise to the required level of important state interest. Nor should this Court allow an accusation of a minor nature to be a bar to the assertion of constitutional rights.

Because there is no important state inter-

est to be served by abstention, and in light of the rights of the petitioners, the invocation of the abstention doctrine here, and the use of the "pertinent inquiry" test, were improper.

3. In extending the abstention doctrine to include the notice procedure herein, the court deprives the citizen of the right to initiate a federal claim in the forum of his choice. It does so on the incorrect assumption that the issuance leads "inexorably to a state court proceeding providing the alleged violator with 'a concrete opportunity to vindicate his constitutional rights'" (App. Dec., pa. 4). This misapprehension has worked a great harm.

As is evidenceed by the notice issued to Charles Ollivier on January 26, 1980, and the subsequent refusal, despite demand, of the Village of Mundelein to proceed, the lower court's decision can deprive the citizen of any remedy at all(see: Intern. Longshoremen's Union v. Waterfront Com'n, 495 FS 1101, 1111 (S.D. NY, 1980)). Petitioners are not the only citizens so situated.

Under the decision of the lower court, upon issuance of a notice the federal courthouse is barred to the citizen by the abstention doctrine; however, state court action is not begun until the issuance of a complaint and summons (App. Dec., pa. 3).

Because a citizen can not compel a municipality to proceed beyond the notice stage, the state courthouse door is also barred. The aggrieved citizen is without remedy for the violations of his constitutional rights. This is fundamental unfairness.

CONCLUSION

WHEREFORE, the petitioners' writ should be granted and the Court be fully advised by further brief of counsel.

Respectfully submitted,

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April 28, 1981

Text of October 29, 1979, opinion of the U.S. District Court for the Northern District of Illinois, Eastern Division, in the cause Charles and Annette Ollivier v. Arthur Glitz, et al, 79 C 4280.

This matter comes before the court on plaintiffs' motion for a temporary restraining order and defendants' motion to dismiss. For the reasons set forth below, plaintiffs' motion is denied and defendant motion is granted.

In their complaint plaintiffs allege that on several occasions they have been issued notices of ordinance[1] violations which charge them with failing to display valid vehicle tags,[2] that these notices were issued page 2 after unconstitutional searches of their property, that such unconstitutional searches were conducted pursuant to an official policy established by the Village of Mundelein,

1/ Omitted.

2/ Article I, Section II of the Ordinance states: "License Required. It is unlawful to own or operate a motor vehicle registered within the State of Illinois with an address within the corporate limits of Mundelein without a valid Village of Mundelein Vehicle License, properly affixed."

and that each day plaintiffs fail to comply with the Ordinance constitutes a separate punishable offense.3/ As a result plaintiffs contend that they have been deprived of their rights guaranteed by the fourth and eighth amendments to the United States Constitution and ask this court, inter alia, to declare the Ordinance unconstitutional and to enjoin enforcement of the Ordinance. At the hearing on the motion for a temporary restraining order, defendants orally moved that the complaint be dismissed.

In Younger v. Harris, 401 US 37 (1971), and Samuels v. Mackell, 401 US 66 (1971), the Supreme Court held that an action in federal court for declaratory and injunctive relief is improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated. These holdings reflect

3/ Article IV of the Ordinance states: "Penalty. Any person, firm or corporation violating any provision of this ordinance shall be fined not less than five dollars ...nor more than five hundred dollars... for each offense; and a separate offense shall be deemed committed on each day during or on which a violation occurs or continues."

a strong policy against federal intervention in state judicial process. Moore v. Sims, 47 USLW page 3 4693, 4695 (1979). Thus, a federal court should not exert jurisdiction if the plaintiff has an opportunity to raise his constitutional claims in the pending state proceedings. Id. at 4696.

Here, notices of ordinance violations have been issued. The notice itself states that plaintiffs may pay the fine or request a court date. Since the plaintiffs have not paid the fines, there are state proceedings pending in which they can raise their claims.

However, the Younger-Samuels doctrine may not apply if (1) the state proceeding is motivated by a desire to harass or is conducted in bad faith, (2) the challenged statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it, or (3) irreparable injury is both great and immediate. Moore v. Sims, 47 USLW at 4696, 4698. None of these situations are present here. (ORDER CONTINUES)

Text of February 2, 1981, order of the U.S. Court of Appeals for the Seventh Circuit, in the cause Charles and Annette Ollivier v. Arthur Glitz, et al, 80 - 1027.

Plaintiffs-appellants Charles and Annette Ollivier appeal from a judgement of the district court dismissing their 42 USC sect. 1983 civil rights suit. We affirm only part of the district court's judgement.

I

On July 3, October 3, and October 5, 1979 the appellants were issued "notices of ordinance violations" (or "citations") by officers of the police department of the Village of Mundelein. Each citation charged the appellants with failure

page 2

to display valid vehicle tags.1/ Each citation also informed the

1/ Village Ordinance #73-11-27 states, inter alia, that "it is unlawful for any person, firm or corporation to own or operate a motor vehicle registered within the State of Illinois with an address within the corporate limits of Mundelein without a valid Village of Mundelein License properly affixed." The ordinance goes on to levy a fine of between $5 and $500 per offense and notes that each day that a violation occurs or continues constitutes an offense.

appellants that the penalty for the violation was a $25 fine and that the appellants had the option of either paying the penalty or requesting a court date. On July 17, 1979 Charles Ollivier paid the fine for the July 3 citation. On October 17, 1980 the appellants filed this suit in the district court.

The suit alleges that the citations were issued as the result of illegal searches, thus violating the appellants' Fourth Ammendment rights. The suit also claims that the penalty for violating the ordinance constitutes cruel and unusual punishment. The appellants sought monetary damages for the Fourth Amendment violations and a declaration that the village ordinance in question was unconstitutional. The defendants in the suit were the Village of Mundelein, the Chief of Police, and the individual officers who issued the citations.

The district court, in dismissing the suit, ruled that because fines remained unpaid on the citations there were state proceedings pending in which the appellants could raise their claims. Therefore, according to the district court, under Younger v.

Harris, 401 US 37 (1971), the federal courts should abstain from the matter.

II

In Younger v. Harris, supra at 43-45, the Supreme Court held that considerations of equity, comity and federalism require that federal courts decline to entertain federal constitutional challenges to state action in the absence of extraordinary circumstances when the federal claim may be raised in an ongoing state proceeding. Appellants argue on appeal that the district court erred in holding that this rule applies here. They first argue that Younger does not apply because no state judicial proceedings regarding the alleged ordinance violations were pending at the time they commenced their federal civil rights action. As to the violations alleged to have occurred in October, they content judicial proceedings were not instituted until January 15, 1980, when they were served with summons and complaints, some three months after their federal complaint was filed and two and a half months after it was dismissed on abstention grounds. And as to page 3

the July violation, appellants point

out that the fine had been paid at the time they commenced their federal action, and thus no state court proceedings were contemplated. Under these circumstances, they claim it was error for the district court to refrain from deciding this case on its merits.

Addressing first appellants' arguement relating to the October violations, we agree that, technically, no state judicial proceeding was pending with respect to those violations at the time their federal civil rights action was commenced. Although appellants were issued citations at the time the violations were discovered, this did not commence state judicial proceedings. Ill. Rev. Stat. ch. 24, sect. 1-2-9 (1977) states quite unequivocally that "in all actions for the violation of any municipal ordinance, the first process shall be a summons or a warrant." Because appellants were not served with summons for the October violations until after their federal suit was filed, it follows that state judicial proceedings were not pending at that time.

Moreover, as the Village itself noted in its brief filed with the Illinois Appel-

late Court in its enforcement action against appellants, the function of a citation or Notice of Ordinance Violation is not to begin judicial proceedings but to provide an opportunity for the person charged with a violation to avoid the necessity of such proceedings:

> "The issuance of a Notice of Ordinance Violation is a commonly used procedure by the municipalities of the State of Illinois to effect collections of fines and penalties without the institution of court proceedings. The procedure reasonably affords a citizen charged with an opportunity to understand the nature of the violation, and to resolve the situation without the necessity of court record or appearance if he or she so desires. As such, the procedure simplifies the payment of fines and penalties by the citizen, expedites the collection of funds by the municipality, and relieves the court system of the tremendous burden which would otherwise be imposed upon it."

However, despite our agreement with the appellants that no state judicial proceeding was pending with respect to the violations alleged to have occurred in October at the time they commenced their federal action, we do not conclude from this that Younger abstention was therefore

inappropriate. We believe the citations issued to appellants, while insufficient by themselves to formally initiate judicial proceedings,are sufficient to place the matter within the state forum, at least until they are paid or otherwise disposed of. The failure to page 4 pay the citations leads inexorably to a state court proceeding providing the alleged violator with "a concrete opportunity to vindicate his constitutional rights." Steffel v. Thomas, 415 US 452 (1974). As indicated above, the issuance of a citation rather than a formal complaint is intended only to simplify and expedite the collection of fines and penalties from citizens who do not contest the fact of a violation and who wish to avoid a court appearance. It should not serve to permit federal intervention where it would otherwise be clearly inappropriate.

A different question is presented, however with respect to the claims relating to the July violation. The citation issued for that violation was paid without either a contest or an appeal. Thus, there is no pending state court proceeding and none

will be commenced in the future.

In Huffman v. Pursue Ltd., 420 US 592 (1975), the Supreme Court ruled that federal courts should not serve as substitutes for state appellate courts and held that "Younger standards must be met to justify federal intervention in a state judicial proceedings as to which a losing litigant has not exhausted his state appellate remedies." Id. at 609. In light of this holding, appellants' failure to even contest the July violation and assert their constitutional claims as a defense in the state court proceedings available to them would seem to preclude them from raising those same claims in federal court. But in Wooley v. Maynard, 430 US 705 (1977), the court limited the rule announced in Huffman to cases in which federal intervention was sought to annul the results of the unappealed state court decision. In that case the federal plaintiff sought injunctive and declaratory relief against enforcement of a state statute under which he has suffered three prior convictions, none of which he had appealed. In rejecting the argument that Huffman controlled, the Court stated that

because the federal relief sought by the plaintiff would have no effect on his prior state convictions, but instead was wholly prospective, Younger was not a bar.

Similarly in this case, appellants' claim for damages resulting from allegedly unconstitutional search of their property do not place in issue the uncontested ordinance violation. Assuming that the search of appellants' property was unlawful and that it either resulted in a compensable injury other than payment of the fine,2/ or was so flagrantly page 5

unlawful as to justify the imposition of punitive damages, the granting of such relief would have no effect on appellants' liability for the violation which the search disclosed. Moreover, because relief in damages is not available in an action for a municipal ordinance violation, even if appellants had contested the violation

2/ Huffman clearly bars recovery of the fine paid by appellants as part of their damages. Their failure to contest the July violation and raise the Fourth Amendment issue as a defense to their liability for the ordinance violation constitutes a waiver of that defense. They may not circumvent the state proceeding by seeking to recover the fine paid as part of their damages in a federal civil rights action.

in state court, they could not have obtained the relief they seek here. We see no substantial interest that would be served by forcing them to sacrifice their time, effort and expense to contest a $25 fine in state court as a prerequisite to pursuing their damage claim in federal court. This is especially true in view of the fact that an adverse ruling on the Fourth Amendment issue in state court would bar any action in federal court based on the allegedly illegal conduct. Allen v. McCurry, 49 LW 4015 (1980). 3/ Under these circumstances, we conclude

3/ We note that in this recent decision the Supreme Court expressly refrained from deciding whether a sect 1983 claimant would be precluded from litigating in federal court an issue he might have raised but did not raise in a previous state proceeding. 49 LW at 4017 n.5. At least one circuit has held that the state judgement does not bar litigation of such an issue in feceral court. Graves v. Olgiati, 550 F2d 1327 (2d Cir, 1977), Lombard v. Bd. of Education, 502 F2d 631 (2d Cir, 1974). In our view, the doctrine of collateral estoppel, upon which the Court based its decision it Allen, does not apply to issues that were not actually litigated in the state proceeding and whose determination was not necessary for the state judgement. See Restatement of Judgements (Second) sect 68 (Tent. Draft No. 1, March 28, 1973).

that appellants' failure to contest the July violation in state court does not preclude them from pursuing their damage claims relating to that violation in federal court. The district court erred in dismissing that portion of the complaint.

Lastly, appellants contend that Younger does not apply to this case at all because state court proceedings for the violation of municipal ordinances are civil in nature, and Younger applies only to prevent federal intervention in state criminal proceedings. This contention is without merit. In Moore v. Sims, 442 US 415, 430 (1979), the Supreme Court stated that in deciding whether to apply the principles of Younger, "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims..." The state court proceedings here at issue clearly do provide such an opportunity and the application of Younger was therefore proper.

The district court's judgement is reversed only with respect to appellants' claims for damages relating to the July citation. In all other respects it is affirmed.